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IN THE

Supreme Court of the United States

JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL OF MISSOURI, *et al.*,

Petitioners,

v.

MISSOURI MUNICIPAL LEAGUE, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF KNOLOGY, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

Knology, Inc. ("Knology") respectfully submits this brief as *amicus curiae*, pursuant to Rule 37.3 of the Rules of this Court.[1]

Knology, one of a growing number of competitive providers of telecommunications services, owes its existence to the pro-competition provisions of the Telecommunications Act of 1996 ("Act"). Because Knology has a vital interest in the Act's core goal of opening telecommunications markets to competition, it also opposes the attempt by Petitioners and their *amici* to undermine that goal.

Knology provides telecommunications services to more than 125,000 residential and business customers in eight markets across the southeastern United States.[2] It provides these services as part of a "bundle" of communications offerings that includes cable television service and high speed Internet access. Knology delivers these services through interactive broadband networks employing state-of-the-art fiber optic technology.

In each of its markets, Knology competes with incumbent telephone companies and cable operators. Before Knology entered those markets, those incumbent service providers enjoyed monopolies. To protect those monopolies, they employed a variety of tactics to prevent, delay or increase the cost of Knology's entry. *See, e.g., Knology v. Insight Communications Co.*, 2001 WL 1750839 (W.D. Ky.

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[1] Pursuant to rule, the consents of both the Petitioners and the Respondents have been obtained and filed with the Clerk of the Court. No counsel for either party has authored this brief, in whole or in part, and no person other than Knology has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

[2] Knology's markets include Huntsville and Montgomery, Alabama; Panama City, Florida; Augusta, Columbus, and West Point, Georgia; Charleston, South Carolina; and Knoxville, Tennessee.

Mar. 20, 2001) (challenging anticompetitive franchise provision forced on Knology by incumbent cable provider); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, F.C.C. 02-338 (Dec. 31, 2002), ¶¶ 108-111 (detailing predatory pricing and other tactics used by incumbents to deter entry by competitors) (hereinafter "*FCC Annual Assessment*"). In addition, as the second entrant in each market, and as one of several providers of high speed Internet access, Knology generally has fewer customers than its competitors. Only by combining revenues from its bundled service offerings – telephone, internet, and cable television – can Knology maintain its financial viability.

Knology has used joint ventures with public utilities as a vehicle for entering new markets. For example, a Knology subsidiary in Newnan, Georgia offers telephone service, cable television, and Internet access through a fiber network built by Newnan Utilities, a municipally-owned entity that also provides power and water service. Knology contemplates entering into similar ventures with municipal utilities in the future.

In addition, Knology is a member of the National Cable Television Cooperative ("NCTC"), which acts as Knology's agent in acquiring rights to the video programming that Knology includes in its "bundle." The NCTC negotiates rates for that programming with satellite and broadcast programming vendors based on the combined subscriber numbers of its members. Many other competitive broadband service providers are members of the NCTC, including both private and municipally owned entities. The combined subscriber numbers of these concerns enable them to achieve economies that at least partially offset the advantage of scale enjoyed by their incumbent rivals.

Affirmance of the decision below will preserve the ability of local governments and competitive broadband providers to bring competition to the telecommunications marketplace. The Act broadly bars state and local

governments from prohibiting "any entity" from providing telecommunications services. 47 U.S.C. § 253(a). Petitioners' challenge to that provision should be rejected because – in addition to the reasons articulated in Respondents' brief – (i) it would impair important First Amendment interests of Knology and consumers, (ii) it would create uncertainty about the Act's meaning and spawn considerable follow-on litigation, and (iii) it would give incumbent monopolists an additional tool for thwarting the Act's pro-competitive purpose. The Court should not rebuild barriers to competition that Congress so clearly dismantled.

SUMMARY OF ARGUMENT

The decision of the United States Court of Appeals for the Eighth Circuit should be affirmed for several reasons.

First, Petitioners urge that a strained and implausible reading of § 253(a) is necessary to protect state autonomy. Although those federalism concerns do not support the judicial nullification of § 253(a), as set forth in Respondents' Brief, Petitioners ignore an important countervailing consideration: the outcome they seek would impair the First Amendment rights of Knology and other competitive broadband providers. These entities cannot effectively provide cable television services without offering telecommunications services, sometimes in joint arrangements with municipalities. If states could prohibit local governments from providing or offering telecommunications services, then the speech rights of broadband providers would be harmed. Moreover, Petitioners' rewriting of § 253(a) would implicate the speech rights of many others who otherwise would use internet and telephone services offered by municipal/broadband ventures. This Court should construe § 253(a) to avoid these constitutional deprivations.

Second, Petitioners' attempt to rewrite the statute would embroil the courts in sterile disputes about what kind of

municipal "entity" may be barred from providing telecommunications services. Congress adopted language that left no room for disputes about *which* entities a state might bar from the market: none may be barred. A holding that states may exclude *some* entities, however, would trigger extensive litigation over *which* entities may be so barred. The Act itself supplies no guidance for resolving such litigation, since it announces only that state and local governments may not restrict "any entity" from providing these services. If this Court were to ignore Congress' clear language, it would force courts to make a series of unguided policy guesses to resolve the subsequent litigation.

Finally, affirmance will directly promote competition, the primary objective of the Act. Petitioners' *amici* have long fought to throttle competition. Their arguments here seek the same end by blocking municipalities from establishing telecommunications systems that offer better service and lower prices. This Court should not permit the pro-competitive goal of the Act to be defeated.

ARGUMENT

I. THE COURT SHOULD NOT REWRITE THE ACT TO INFRINGE PROTECTED SPEECH.

Petitioners insist that, in order to preserve the states' authority over political subdivisions, the preemptive terms of § 253(a) should not be enforced. Petitioners cite *Gregory v. Ashcroft*, 501 U.S. 452 (1991), for the proposition that Congress must be very clear about its intent to preempt state law in areas of traditional state authority. Fed. Pet. Br., at 12-25. Although the *Gregory* standard does not support the rewriting of § 253(a) sought by Petitioners, Petitioners also ignore an important countervailing consideration: rewriting § 253(a) would impair core First Amendment rights. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The speech interests imperiled by petitioners' arguments

counterbalance any federalism interests asserted by Petitioners.

Competitive broadband service providers offer telecommunications services in "bundles" that also include cable television and high speed internet access. Private broadband providers now serve more than one million customers in communities with more than 17 million homes, using more than 32,000 miles of fiber optic cable they installed for this purpose. *See FCC Annual Assessment* ¶ 105.

Some private broadband providers operate their networks as joint ventures with public utilities. Knology – which operates such a network in Newnan, Georgia, and anticipates entering into similar ventures in the future – is by no means unique in doing so. RCN, a private broadband service provider with more than 500,000 customers in numerous markets, offers bundled communications services in joint ventures with electric utilities in both Boston and Washington, D.C. *See Cablevision of Boston, Inc. v. Pub. Improvement Comm'n*, 184 F.3d 88, 91-93 (1st Cir. 1999); *FCC Annual Assessment*, n. 345. Other competitive broadband service providers follow the same model in other markets. *Id.* ¶¶ 99-101.

A broadband provider that includes cable television service is a protected speaker under the First Amendment. *See, e.g., Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 662-63 (1994); *Leathers v. Medlock*, 499 U.S. 439, 444 (1991); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986). To exercise their speech rights, however, competitive broadband providers must offer not only cable television, but also telephone and Internet services. Without providing the full bundle of communications services, broadband providers can effectively provide none. *See FCC Annual Assessment*, ¶ 102. As a result, a significant avenue of competitive entry would be sealed off if the Act were rewritten so states could prevent local governments from providing telecommunications

services. That rewriting of the Act would immediately cancel the speech rights of broadband providers in joint ventures with municipal utilities.

In addition, competitive broadband providers supply internet and telephone services through which customers exercise their own First Amendment rights. *See Reno v. American Civil Liberties Union*, 521 U.S. 844 (1996) (applying First Amendment protections to Internet transmissions); *Illinois ex rel. Madigan v. Telemarketing Assocs.*, Inc., -- U.S. --, 123 S. Ct. 1829 (May 5, 2003) (same, for telephone solicitations for charities). If states can prevent municipalities from offering telecommunications services, customers will lose those facilities for communicating their speech.

These First Amendment interests offset any federalism-based justification that Petitioners may assert. As this Court held in another First Amendment context, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.*, 485 U.S. at 575. The Court in that case refused to follow a statutory interpretation by the National Labor Relations Board that handbilling by union members represented illegal coercion under the National Labor Relations Act. Because the Board's interpretation threatened the First Amendment rights of union members, the Court construed the law not only to avoid the threatened constitutional deprivation, but also to accord due respect to Congress by assuming it did not intend "to infringe constitutionally protected liberties." 485 U.S. at 575. There is no justification for abridging speech interests by adopting the counter-textual statutory interpretation urged by Petitioners in this case.

Indeed, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), recognized that First Amendment interests may

outweigh state prerogatives afforded by the Constitution's federal structure. That decision held that the Twenty-First Amendment's grant of state power to regulate alcoholic beverages did not allow states "to ignore their obligations under other provisions of the Constitution." *Id.* at 516. In that case, First Amendment speech rights outweighed the state's constitutional powers. By similar reasoning, the Court should not rewrite the plain language of § 253(a) to vindicate state interests at the expense of constitutionally protected speech.

Even if Petitioners' professed federalism concerns could justify ignoring the plain language of § 253(a) – a highly doubtful proposition, for the reasons stated in Respondents' brief – those concerns cannot trump both Congress' plain intent and fundamental First Amendment interests that would thereby be impaired.

II. THE COURT SHOULD NOT CONSTRUE "ANY ENTITY" TO CREATE UNCERTAINTY ABOUT WHICH ENTITIES ARE WITHIN THE SCOPE OF THE ACT.

Petitioners ask this Court to rewrite the bar in § 253(a) against state or local limits on telecommunications offerings by "any entity." In effect, Petitioners argue that the statute may be applied only to prevent states from limiting telecommunications offerings by "entities other than municipal ones." By so muddying the categorical language of the statute, this Court would consign to continuing litigation, and the unguided policy choices of the courts, the congressional policy of opening telecommunications markets to competition.

Petitioners would leave the states free to bar municipal entities from providing telecommunications services. In applying this new version of the statute, however, the courts would have no guidance as to what types of "municipal entities" could be so prohibited. The absence of such guidance is not surprising, since Congress intended the

prohibition in § 253(a) to be categorical. Without any congressional guidance, the courts would have no reliable basis for distinguishing among the range of business models adopted by municipalities.

Municipalities may provide telecommunications services through many organizational arrangements: (i) directly through a public agency; (ii) through a municipally-owned corporation; (iii) by establishing public/private joint ventures, such as Knology's enterprise in Newnan, Georgia; (iv) by leasing municipal facilities to private operators; or (v) by other means. If this Court were to hold that "any entity" in § 253(a) really means "any entity except municipal ones," the courts would have to determine which organizational arrangements were so "municipal" as to fall within this judge-made exception. The resulting uncertainty and litigation would be exactly what Congress intended to avoid by using the categorical term "any entity."

These difficulties are apparent in the proceedings below. When the instant case was before the Federal Communications Commission, that agency concluded that Missouri could bar its municipalities from providing telecommunications services. *See In re Missouri Municipal League*, 2001 WL 28068, 16 F.C.C.R. 1157, 1158 (Jan 21, 2001). The Commission noted, however, that whether a state had power to impose such restrictions *could* turn on how municipalities organized their telecommunications ventures: if the municipal entities had provided telecommunications services through independent corporate entities, "we could reach a different result under section 253(a)." *Id.* at 1169. Although the Commission had no occasion to resolve that issue conclusively, it was unable to state whether, or how, the corporate form of the municipal provider would affect its status under the Act.

Entities such as the one hypothesized by the Commission already provide telecommunications services in different parts of the country. *See, e.g., Cablevision*, 184 F.3d at 91-93. If

this Court were to rewrite § 253(a) to exclude "certain municipal entities" from "any entity," then states, local governments and broadband providers would all be unsure of the statute's reach. Instead of resolving the issue, the Court's decision would sow confusion and lead to further litigation.

When a statute does not define a term, such as "any entity," the presumption must be that Congress intended the ordinary meaning of that term. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992). Here, "any entity" must include municipalities, which are entities as the word is normally used. Moreover, when considering two interpretations of a statute, the Court should prefer the one that relies on the language of the statute to determine its scope, rather than forcing the courts to do so through incremental litigation. *See, e.g., Lewis v. United States*, 523 U.S. 155, 175 (1998) (Scalia, J., concurring) ("I am skeptical of any interpretation which leaves a statute doing no real interpretive work in most of the hard cases which it was drafted to resolve.").

The statutory language plainly tells states which entities they may prohibit from entering the telecommunications market: none. This Court should reject Petitioners' efforts to force the courts to decide incrementally, and potentially inconsistently, which municipal entities may be barred.

III. ALLOWING THE TERM "ANY ENTITY" ITS PLAIN MEANING WILL FURTHER THE ACT'S GOAL OF PROMOTING COMPETITION.

Prior to the adoption of the Act, incumbent telecommunications monopolists used various means to exclude competitive providers from their markets, including intensive political action intended to bend the wills of state legislatures. In fact, the regulatory regime then in place "simply propped up *un*natural monopolies created by comfortable collaboration between government regulators and entrenched incumbents in a conspiracy against upstarts eager to compete." Peter W. Huber, Michael K. Kellogg, & John

Thorne, *Federal Telecommunications Law* 87 (Aspen Law & Business, 2d ed. 1999). Incumbent providers also took other anticompetitive actions against new entrants, such as preventing them from physically connecting with the incumbents' facilities in order to extend services to potential customers. *See Verizon Communications v. FCC*, 535 U.S. 467, 532 (2002).

Congress has recognized that the incumbents' monopolistic actions restrict competition. As one House Report noted, "local exchange carriers maintain control over the essential facilities needed for the provision of local telephone service... The inability of other service providers to gain access to these functions and capabilities inhibits competition that would otherwise develop in the local exchange market." H.R. Rep. No. 103-560, at 28, *available at* WL, 1994 A&P H.R. Rep. 103-560 (accompanying H.R. 3636, 103d Cong. (1994)).

The primary purpose of the 1996 Telecommunications Act was to end this era of state sponsored monopoly, and implement a new national policy to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid development of new telecommunications technologies." Telecommunications Act of 1996, 100 Stat. 56 (1996). Knology and other private broadband service providers are the direct result of this new pro-competition policy, as are municipal broadband service providers and the various joint ventures between these private and public entities around the country.

Petitioners' *amici* are the same entities that fought competitive entry before the Act was adopted. Deprived of their former status as state sponsored monopolies, they now seek the same result by advancing the cause of state sovereignty. The Court should reject this tactic for regaining monopoly status and defeating the clear intent of Congress to open the nation's telecommunications markets to "any entity."

CONCLUSION

For these reasons, the Court should affirm the decision of the Eighth Circuit.

Respectfully submitted,

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